Supreme Court, U.S.
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# *IN THE SUPREME COURT OF THE UNITED STATES*

**FAIRPORT INTERNATIONAL EXPLORATION, INC.**

*Petitioner,*

**v.**

**THE SHIPWRECKED VESSEL KNOWN AS THE CAPTAIN LAWRENCE, *in rem,***

*Respondent,*

**STATE OF MICHIGAN**

*Intervenor.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Should the Court resolve the existing conflict among the circuits regarding the issue left open by the Court in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), namely, the admiralty law test for an abandonment of property long-lost at sea?

## PARTIES TO THE PROCEEDINGS

The petitioner in this case is Fairport International Exploration, Incorporated. Pursuant to Supreme Court Rule 29.6, Fairport International Exploration, Incorporated states that it has no parent companies or nonwholly owned subsidiaries.

The respondent in this *in rem* admiralty action is the wreck of the motor vessel *Captain Lawrence*.

The intervenor in this action is the State of Michigan.

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No.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, dated April 17, 2001 is reproduced at page 1a of the Appendix to this Petition ("Pet. App."). The opinion and order of the United States District Court for the Western District of Michigan, dated November 2, 1999, is reproduced at Pet. App. 25a.

## JURISDICTION

The judgment of the court of appeals was entered on April 17, 2001. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Article III, section 2, clause 1 of the Constitution of the United States provides: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction...."

## STATEMENT OF THE CASE

This case presents the issue left open by the Court in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), the maritime law standard for abandonment.

The *Captain Lawrence* sank in 1933 near Poverty Island in northern Lake Michigan. Built in 1898, the vessel was purchased in 1931 by Wilfred H. Behrens. The *Captain Lawrence* met its demise when Behrens and his crew sailed from Milwaukee to northern Lake Michigan in an attempt to locate gold which, legend has it, sank in northern Lake Michigan during the Civil War. It is undisputed that in 1994, Behrens' heirs assigned to Fairport Behrens' ownership interests, including the exclusive right to salvage the remains of the vessel. It is also undisputed that neither Behrens' nor anyone else ever expressly renounced title to *the Captain Lawrence*. Fairport discovered what it believes to be remains of the vessel during dives off Poverty Island in 1984 and 1985.

Despite Fairport's undisputed ownership interests as success to Behrens, however, the State of Michigan has precluded Fairport from exploring and recovering its property in the area of lakebed where it believes the *Captain Lawrence* is embedded.

On June 27, 1994, Fairport initiated this proceeding in the United States District Court for the Western District of Michigan by filing an *in rem* admiralty action against the *Captain Lawrence*. The State of Michigan intervened, asserting title to the wreck of the *Captain Lawrence* under the Abandoned Shipwreck Act, 43 U.S.C. §§ 2101-06 ("the ASA").

The State moved to dismiss Fairport's action for lack of jurisdiction based on the Eleventh Amendment to the United States Constitution. The district court determined that jurisdiction depended on whether the ASA had transferred title to the *Captain Lawrence* to the State, a question that turned on whether the owner of the *Captain Lawrence*, Wilfred Behrens, had abandoned the vessel. The district court conducted an evidentiary hearing and later dismissed Fairport's action. *Fairport Int'l Exploration, Inc. v. The Captain Lawrence*, 913 F. Supp. 552 (W.D. Mich. 1995) ("*Fairport I*").

The court found that the State did not need to establish definitively that the vessel was abandoned and that the admiralty law standard for abandonment did not require proof of an express renunciation of title, but instead could be inferred. According to the court, the Eleventh Amendment would bar the suit if the State showed by a preponderance of the evidence that Behrens abandoned the *Captain Lawrence* and that, therefore, the State had a colorable claim to it. The

district court concluded that the State met this standard and found that the State had a colorable claim of ownership of the *Captain Lawrence* under the ASA. As a result, the district court held that the Eleventh Amendment prohibited Fairport's action against the State.

Fairport appealed the district court's decision in *Fairport I*. The court of appeals affirmed the district court's ruling. *Fairport Int'l Exploration, Inc. v. The Captain Lawrence*, 105 F.3d 1078 (6th Cir. 1997) ("*Fairport II*"). Fairport filed a petition for a writ o certiorari. On April 27, 1998, the Court vacated *Fairport II* and remanded the case to the court of appeals for proceedings consistent with the Court's holding in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998).

In *Fairport Int'l Exploration, Inc. v. The Captain Lawrence*, 177 F.3d 491 (6th Cir. 1999) ("*Fairport III*"), the court of appeals remanded the case to the district court with instructions to apply the "clear and convincing evidence" standard in order to determine whether the State proved that Behrens abandoned the *Captain Lawrence* under the ASA. It did not, however, require application of the express standard for abandonment, instead continued to uphold the implied theory of abandonment, allowing abandonment of maritime property to be inferred without proof of an express renunciation of title by the owner.

This court elaborated on the evidence that the district court was to consider when applying the implied abandonment standard:

> [T]he district court must reexamine, and supplement if necessary, the evidence adduced in the earlier

> proceedings . . . . In light of the conflicting evidence regarding whether Behrens had access to the technology necessary to salvage the ship, the lack of evidence concerning whether Behrens ever returned to Poverty Island, and the testimony regarding Behrens's intention to return, the district court must determine 'whether the evidence is fit to induce conviction in the minds of reasonable persons under this elevated, relatively stringent evidentiary standard.' *Miller's Bottled Gas, Inc. v. Borg-Warner Corp.*, 955 F.2d 1043, 1050 (6th Cir. 1992).

*Id.* at 501. In a footnote at the end of this passage, the court of appeals stated:

> While the record might support a logical inference that Behrens did not intend to reclaim his ship, it also appears to support a finding that Behrens passed away before he raised the funds to effect a salvage operation; his lack of overt efforts to claim the ship may comport as much with a concern for secreting the putative gold as with an intent to abandon the ship.

*Id.* at 501 n.4.

Following remand, on November 2, 1999, the district court again dismissed Fairport's claim. *Fairport Int'l Exploration, Inc. v. The Captain Lawrence*, 72 F. Supp. 2d 795 (W.D. Mich. 1999) ("*Fairport IV*"). The district court did not conduct an evidentiary hearing on remand. The court reviewed the existing record in the case, including the conflicting evidence noted by this court in *Fairport III*, and concluded that the evidence clearly and convincingly supported the conclusion that Behrens abandoned his vessel.

Fairport timely filed a notice of appeal. Despite the absence of a scintilla of evidence that Behrens had expressly abandoned his interest in the *Captain Lawrence*, the court of appeals affirmed the dismissal of Fairport's claim based on its application of the implied standard for abandonment.

## REASONS FOR GRANTING THE WRIT

The Court's attention is warranted to address a conflict among the circuits regarding the admiralty law standard for abandonment, left open in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998).[1] The existing circuit conflict has filled the once clear law of admiralty with chaos and complexity. It has nullified Congress' enactment in the Abandoned Shipwreck Act of 1987. It has blurred lines of state-federal jurisdiction over shipwrecks within U.S. territory. The conflict among the circuits has eroded the responsiveness of admiralty law to new and emerging technologies for maritime exploration. It has chilled ocean exploration aimed at carrying those emerging technologies into the future. It has spawned the assertion of stale claims and rampant forum shopping. Absent resolution by the Court, the insidious effects of the existing circuit conflict will continue into the foreseeable future.

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[1] The Court has also adverted to the abandonment of shipwrecks in another case, but has not had occasion directly to address the issue. *See Florida Department of State v. Treasure Salvor, Inc.*, 458 U.S. 670, 677 & n.8 (1982) (Opinion of Stevens, J.) (discussing district court's application of *animus revertendi* doctrine and consequent vesting of ownership in sunken vessel's finder).

## I. THE COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS OVER THE ADMIRALTY LAW STANDARD FOR DETERMINING THE ABANDONMENT OF PROPERTY LONG-LOST AT SEA

Three different circuits, state courts and numerous legal scholars have recognized the fundamental conflict among the circuits regarding the standard for abandonment in admiralty law. Most recently, the U.S. Court of Appeals for the Fourth *Circuit Opinion has recounted the unresolved conflict among* the circuits:

> Columbus-America argues that we should adopt the dissenting opinion's abandonment test and overrule the prior panel's judgment under exceptions to the law of the case doctrine. After examination of the cases cited by Columbus-America, we agree that the majority's abandonment test was rejected by two other courts of appeal, the Ninth Circuit in Deep Sea Research, Inc. v. The Brother Jonathan, et al., 102 F.3d 379, 387-88 (9th Cir. 1996), aff'd in part, vacated in part on other grounds, and remanded, 118 S.Ct. 1464, 1473 (1998) and the Sixth Circuit in Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, et al., 105 F.3d 1078, 1084 (6th Cir. 1997), vacated and remanded on other grounds, 118 S. Ct. 1558 (1998). The Supreme Court, however, did not define abandonment when it reviewed California v. Deep Sea Research, Inc., 523 U. S. 491 (1998) (leaving the issue of whether the Brother Jonathan was abandoned under the Abandoned Shipwreck Act for reconsideration on remand). The Court either declined to or simply did not resolve the conflict between the Sixth, Ninth and Fourth Circuits regarding the test for

> abandonment and instead remanded "with the clarification that the meaning of 'abandoned' under the ASA conforms with its meaning under admiralty law." California v. Deep Sea Research, Inc., 523 U.S. 591, 508 (1998).... The rule in the three circuits is not the same and the Supreme Court has not clarified the question as above quotation from Deep Sea Research v. (Brother Jonathan) indicates.

*Columbus-America Discovery Group v. Atlantic Mutual, et al.*, 203 F.3d 291 (4th Cir. 2000).

The Ninth Circuit discussed the conflict among the circuits in *Deep Sea Research, Inc. v. The Brother Jonathan*, et al., 102 F.3d 379, 387-88 (9th Cir. 1996), aff'd in part, *vacated in part on other grounds, and remanded sub nom. California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998). The court of appeals rejected the Fourth Circuit test, noting that "In holding that abandonment could only be found on the basis of an express renunciation of ownership, the Fourth Circuit introduced a significant modification into maritime law." 102 F.3d at 388 (citing *Columbus-America*, 974 F.2d at 472 (Widener, J., dissenting). The court of appeals found that, even though the court below had cited the Fourth Circuit opinion, it had instead followed the Ninth Circuit rule of inferred abandonment. *Id.*

On review of the Ninth Circuit decision following a grant of certiorari, the Court held that the Eleventh Amendment was not a bar to federal jurisdiction even if the *Brother Johnathan* were abandoned. *California v. Deep Sea Research, Inc.*, 523 U.S. at 507-08. The Court affirmed the court of appeals' determination of jurisdiction over the *Brother Johnathan*, stating simply that "the meaning of 'abandoned' under the ASA

conforms with its meaning under admiralty law." *Id*, at 508. The Court did not then go on to define the meaning of abandonment of admiralty law, instead leaving that issue for another day.

The Sixth Circuit discussed the conflict among the circuits in during proceedings below in this case. *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, et al.*, 105 F.3d 1078, 1084 (6th Cir. 1997), *vacated and remanded on other grounds*, 523 U.S. 1091 (1998). The court of appeals distinguished the test for abandonment under admiralty law from the test under the Abandoned Shipwreck Act of 1987, stating that the ASA did not contemplate an express abandonment, which is "obviously rare indeed, and application of such a rule would render the ASA a virtual nullity." *Id.* at 1085. After discussing the conflict between the inferred abandonment standard of the *Brother Jonathan* and the "opposing view" in *Columbus-America*, the Sixth Circuit held that it would "follow the lead of *Brother Jonathan* rather than that of *Columbus-America*." *Id.* On remand, while continuing to eschew the Fourth Circuit's express abandonment standard, the Sixth Circuit further ripened the circuit conflict by requiring proof of abandonment by "clear and convincing evidence," as required by the Fourth Circuit, rather than the "preponderance" standard applied in the First, Fifth, Ninth and Eleventh Circuits, in *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, et al.*, 177 F.3d 63 (6th Cir. 1999).

Thus, the conflict among the circuits goes beyond the strict definition of abandonment, and also extends to presumptions and the burden of proof. *See generally Jones, The United*

*States Supreme Court and Treasure Salvage: Issues Remaining After Brother Johnathan*, 30 J. Mar. L & Comm. 205, 213-220 (1999); McGaulghlin, *Roots, Relics and Recovery: What Went Wrong with the Abandoned Shipwreck Act of 1987*, 19 COLUM.-VLAJ. L. & ARTS 149 (1995); Lorello, Jr., Comment, *The Abandoned Shipwreck Act: Navigation through the Fog*, 35 Gonz. L. Rev.75 (1999/2000).

Some circuits create a presumption of abandonment if the vessel has been sunken for 75 years or more. The First Circuit has presumed abandonment based on the passage of time. *See Martha's Vineyard Scuba Headquarters v. Unidentified, wrecked and Abandoned Steam Vessel* 833 F.2d 1059, 1064-65 (1st Cir. 1987) (abandonment where articles have been "so long lost that time can be presumed to have eroded any realistic claim of original title.") The Fifth and Eleventh Circuits have also presumed abandonment based on the lapse of time. *See Treasure Salvors, Inc. v. Unidentified & Wrecked Sailing Vessel*, 569 F2d 330, 337 (5th Cir. 1978) ("Disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths"); *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel* 758 F2d 1511, 1514 (11th Cir. 1985) ("The common law of finds is the appropriate law to examine to determine the ownership of the shipwreck."). The United States has espoused this definition of abandonment in its brief in *California v. Deep Sea Research, Inc.*, positing that abandonment may be presumed from the passage of time.

In other circuits, abandonment is not presumed based solely on the passage of time, but instead may be inferred. The Third, Sixth and Ninth circuits permit an inference of

abandonment based on a consideration of all the facts and circumstances of the case. *Compare Deep Sea Research, Inc. v. The Brother Jonathan, et al.*, 102 F.3d at 387-88 *with Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, et al.*, 105 F.3d at 1084[2] Even those circuits are in conflict, however, as to the burden of proof of abandonment. Whereas the Ninth Circuit imposes a preponderance standard, the Sixth Circuit requires proof by clear and convincing evidence. *See Deep Sea Research, Inc. v. The Brother Jonathan, et al.*, 102 F.3d at 386; *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, et al.*, 105 F.3d at 1084. Still further compounding the confusion, even within circuits, it is not clear whether the absence of technology is a bar, per se, to a finding of abandonment, or instead one factor to be weighed with the totality of the other evidence. *Compare Yukon Recovery, LLC v. Certain Abandoned Property*, 205 F.3d 1189 (9th Cir. 2000) *with Deep Sea Research, Inc. v. The Brother Jonathan, et al.*, 102 F.3d at 387-88.

At the opposite end of the spectrum, the Fourth Circuit and its adherents require that where an owner asserts a claim title, there must be clear and convincing evidence of an express, affirmative abandonment. *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 2000 WL 1015814 (4th Cir.

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[2] Those circuits usually distinguish the abandonment of merchant vessels and other private property from the requirement of express abandonment that applies to property of the sovereign. *See United States v. Steinmetz*, 973 F. 2d 212, 223 (3rd Cir. 1992), *cert. denied* 507 U.S. 984 (1993) ("[A]though an inference of abandonment can sometimes be made from non-use of private property, property of the United States can only be abandoned as authorized by Congress").

July 21, 2000) (maritime law standard for abandonment requires proof of "an express abandonment by 'clear and convincing evidence,'" *citing Columbus-America*, 974 F.2d at 464); *Columbus-America v. Atlantic Mutual*, 974 F.2d 450, 464-65 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993); *Sea Hunt v. The Unidentified, Shipwrecked Vessel or Vessels, etc.*, 47 F. Supp. 2d 678 (E.D. Va. 1999). The express abandonment approach rejects a factual inquiry into all the circumstances that other courts employ to determine abandonment, since, as a matter of law, there can be no abandonment absent "an owner's express declaration abandoning title." *Sea Hunt*, 47 F. Supp. 2d at 687, *quoting Columbus-America v. Atlantic Mutual*, 974 F.2d 450, 464-65 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993). When an owner appears, abandonment can only be proved "by clear and convincing evidence... such as an owner's express declaration abandoning title." *Columbus-America v. Atlantic Mutual*, 974 F.2d at 464-65. A finding of abandonment can occur in only "two categories" of cases—either where owners "expressly and publicly abandoned their property'" or where "no owner appears: *quoting Columbus-America v. Atlantic Mutual*, 974 F.2d at 464-65 ; *Sea Hunt*, 47 F. Supp. at 687. There is no role under the Fourth Circuit's test for an inquiry into factual circumstances under the doctrine of *animus revertendi*; instead, the standard for abandonment is the same for private and public vessels: express abandonment. *Sea Hunt*, 47 F. Supp at 688.

Under the Fourth Circuit's test for abandonment of maritime property, no abandonment can be found absent an express declaration renouncing title. In the proceedings below, there was not a scintilla of such evidence. Because of the mere fortuity of this case proceeding in the Sixth Circuit rather than the Fourth, however, the courts below entered judgment against Petitioner.

## II. ABSENT ACTION BY THE COURT, THE EXISTING CIRCUIT CONFLICT WILL CONTINUE TO ANNUL CONGRESS' ENACTMENTS, GENERATE COSTLY AND TIME-CONSUMING LITIGATION, BLUR STATE-FEDERAL JURISDICTION, AND SPAWN *CONFUSION IN THE LAW GOVERNING THE* PUBLIC ADMINISTRATION OF HISTORIC SHIPWRECKS

The uncertainty over the admiralty law standard for abandonment has important implications for the law governing management of maritime resources by the Federal Government and the States. Technological advances have made access to shipwrecks easier, creating greater interest in them, but at the same time placing them at risk of destruction. *See* H.R. Rep. No. 514(I), 100th Cong, 2d Sess. 1, *reprinted in 1988* U.S.C.C.A.N. 365. The state and federal governments have determined a vital public interest in protecting cultural resources from pillage, and Congress and the States have accordingly passed legislation aimed at protecting historic shipwrecks.[3]

The major federal statute on point is Abandoned Shipwreck Act of 1987, 43 U.S.C. §2101-2106 ("ASA"). Prior to the ASA, because of conflicting decisions among the courts on the applicable law, state governments had been forced to incur enormous trouble and expense in protecting historic shipwrecks

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[3] All 50 states have programs of cultural resource management, and 40 have established programs for the protection of historically significant shipwrecks. See generally H.R. Rep. No. 514, 100th Cong., 2d Sess., pt. 2, at 2 (1988).

within their waters. Congress sought to clarify the states' ability to exercise stewardship over these resources, so that the states would no longer be required to squander their time and money defending their power to manage the preservation of historic shipwrecks. S. Rep. No. 241, 100th Cong, 1st Sess. 3 (1988); 134 Cong Rec. H1178, 1183 (Mar. 28, 1988).

Under the ASA, the United States asserted title to "any abandoned shipwreck" that is on or embedded in the lands or coralline formations of a State, and then transferred title to most shipwrecks to the State on whose submerged land they are located. 43 U.S.C. §2105. Many states have statutes similarly aimed at protecting historic shipwrecks, most of which define their coverage in terms of abandonment. *See* H.R. Rep. No. 514 (I) at 2, *reprinted in* 1988 U.S.C.C.A.N. 365, 366 (listing statutes). The ASA encouraged states to take steps to protect valuable abandonment shipwrecks for recreational and historical purposes. 43 U.S.C. §2104. The text of ASA, however, contains no definition of the term "abandoned."

Since the Court has held that the meaning of "abandoned" under the ASA is the same as its meaning under the law of admiralty, *California v. Deep Sea Research, Inc.*, 523 U.S. at 508, the circuit conflict over abandonment has virtually nullified Congress' enactment. The conflict creates the exact opposite of the result that Congress had sought, creating new and expensive litigation for the states, hamstringing the states in their efforts to manage the preservation of historic shipwrecks in their waters, and has clouding the respective jurisdictions of the state and federal governments over shipwreck management.

Accordingly, the circuit conflict on the admiralty law standard for "abandonment" implicates substantial state and federal interests, resources and potential liabilities—as well as

the recognition of federalism embodied in the ASA's grant of authority over shipwrecks to the States. The Court's attention to the issue is warranted now to avoid further confusion.

## III. THE COURT'S ACTION TO RESOLVE THE CIRCUIT CONFLICT IS IMPORTANT TO THE PROGRESSIVE DEVELOPMENT OF ADMIRALTY LAW AND THE EMERGING NEW FIELD OF HIGH TECHNOLOGY MARITIME EXPLORATION

The Court's constitutional role in resolving circuit conflicts is especially important in admiralty. The issue raised here "is one of importance in the development of the law maritime, as to which [the Court] ha[s] large responsibilities, constitutionally conferred." *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959).

### A. New Advances in Marine Recovery Technology Have Multiplied Conflicts Over the Law of Long-Lost Shipwrecks, Requiring the Court's Attention

The development of new maritime technologies has made conflict among ancient admiralty law doctrines inevitable. With the development of ever-more sophisticated technologies for exploring the ocean, valuable items long thought hopelessly lost may be recovered, making the determination of abandonment an issue of growing significance. *See* T. Schoenbaum, *Admiralty and Maritime Law* 513 (1987).

Over the past 20 years, the issue of abandonment has recurred in virtually every major historic shipwreck case, and has reached a crescendo over the past five years. On the date of filing of this Petition, cases which hinge on the admiralty law standard for abandonment are pending in district courts across the country, as well as on the dockets of the Fourth, Sixth, and

Eleventh Circuits. Since the date of the Court's decision in *California v. Deep Sea Research*, the gap among the circuits has grown, with each new decision reiterating the circuit split.

This is an appropriate case to resolve the circuit conflict. The facts are simple and straight-forward. The disposition of this case turns solely on the admiralty law standard for abandonment—which, in turn, turns on the Court's resolution of the existing circuit conflict over the express v. inferred standards for abandonment.

### B. The Circuit Conflict Chills Ocean Exploration and Burdens Admiralty Courts That Must Adjudicate Rights in Long-lost Vessels.

Although the Federal Government's public policy strongly encourages deep sea exploration, such exploration is fraught with risks. Exploration of the seabed requires highly complex and sophisticated technologies, and failures can occur at any stage of the exploration process. Enormous sums of venture capital are required if private enterprises, in addition to governments, are to have the opportunity to participate in exploration. *See* U.S. Congress, Office of Technology, *Technologies for Underwater Archaeology and Maritime Preservation—Background Preservation—Background Paper*, OTA-BP-E-37, 8 (1987).

The split among the circuits over the admiralty law standard for abandonment has hampered such deep sea discovery. The existing confusion has spawned years of costly, time-consuming litigation that has diverted valuable resources from the control room of scientific research vessels to the courtrooms across America. What the dissenting Opinion in

the *Columbus-America* case predicted about the consequences of the circuit conflict has come to pass, in spades: opportunities for advancing scientific and historical knowledge have been lost; and scientists and historians have been tied up in lengthy discovery and trial proceedings--eroding the public's confidence in the judicial system.

The conflict among the circuits breaks with the intent of the Framers of the Constitution that admiralty law be uniform throughout the nation. The Court has recognized its constitutional responsibility of upholding the "principle that federal admiralty law should be a 'system of law coextensive with, and operating uniformly in, the whole country.' " *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401-02 (1970).

### C. The Circuit Conflict Presents an Open Invitation to Stale Claims and Forum Shopping.

Continued doubt about the standard for abandonment under admiralty law presents an open invitation to forum shopping favorable to the facts of their case. For disputes over historic shipwrecks, forum shopping is easy because venue obtains in any district where shipwreck artifacts may be brought upon recovery. *See* 28 U.S.C. Sec. 1333. *See generally, Treasure Salvors*, 640 F.2d 560, 567-68 (5th Cir. 1981). With the circuits in conflict, litigants pick and choose among forums based primarily on how a prospective jurisdiction's standard for abandonment meshes with the facts of the case. Litigants can simply take the artifacts to whichever forum follows the abandonment standard most favorable to the facts of their case. Only action by the Court will resolve the conflict and guide the lower courts.

## CONCLUSION

The Court should grant a writ of certiorari.

Respectfully submitted,

FAIRPORT INTERNATIONAL, EXPLORATION INC.

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# APPENDICES

# APPENDIX A

## UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FAIRPORT INTERNATIONAL EXPLORATION, INC.,
*Plaintiff-Apellant,*

v.

THE SHIPWRECKED VESSEL, known as the CAPTAIN LAWRENCE, in rem,
*Defendant,*

STATE OF MICHIGAN,
*Intervenor-Appellee.*

No. 99-2415

Appeal from the United States District Court
for the Western District of Michigan at Marquette.
No. 94-00164--Robert Holmes Bell, District Judge.

Argued: January 23, 2001

Decided and Filed: April 17, 2001

Before: BOGGS and MOORE, Circuit Judges; COHN, District Judge.(*)

*The Honorable Avern Cohn, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

## COUNSEL

**ARGUED:** Michael L. Donner, Sr., CARTER, LEDYARD & MILBURN, Washington, D.C., for Appellant. Joshua W. Gubkin, STATE OF MICHIGAN, Lansing, Michigan, for Appellee. **ON BRIEF:** Michael L. Donner, Sr., CARTER, LEDYARD & MILBURN, Washington, D.C., for Appellant. Stephen F. Schuesler, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

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## OPINION

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BOGGS, Circuit Judge. Plaintiff Fairport International Exploration, Inc. ("Fairport") appeals the district court's dismissal of its in rem admiralty action seeking to establish its right to a shipwrecked vessel, the *Captain Lawrence*. For the following reasons, we affirm.

### I

This is the latest installment in the ongoing saga of the *Captain Lawrence*, a boat that sank in 1933 near Poverty Island in northern Lake Michigan. Built in 1898, the vessel was purchased in 1931 by Wilfred H. Behrens. The *Captain Lawrence* met its demise when Behrens and his crew sailed from Milwaukee to northern Lake Michigan in an attempt to locate gold which, legend has it, sank in northern Lake Michigan during the Civil War. Decades after the 1933 shipwreck and Behrens's death in 1959, Steven Libert, president of Fairport, learned of the legend of the lost gold. Libert discovered what he believes to be remains of the vessel

during dives off Poverty Island in 1984 and 1985. In 1993, the State of Michigan refused Libert's request to dredge an area of lake bed where he believes the *Captain Lawrence* is embedded. In 1994, Behrens's heirs assigned to Fairport the exclusive right to salvage the remains of the vessel. The remaining facts of the case appear in this court's last encounter with the *Captain Lawrence*. *Fairport Int'l Exploration, Inc. v. The Captain Lawrence*, 177 F.3d 491, 493-94 (6th Cir. 1999). The pertinent facts related to the present appeal will be set forth during the course of this opinion.

II

On June 27, 1994, Fairport initiated this proceeding in the United States District Court for the Western District of Michigan by filing an in rem admiralty action against the *Captain Lawrence*. The State of Michigan ("the State") intervened, asserting title to the wreck of the *Captain Lawrence* under the Abandoned Shipwreck Act, 43 U.S.C. §§ 2101-06 ("the ASA").[1] The State moved to dismiss

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[1] The relevant portions of the ASA state:

> (a) *United States title*
>
> The United States asserts title to any abandoned shipwreck that is-
>
> (1) embedded in submerged lands of a State;
>
> . . . .
>
> (c) *Transfer of title to States*
>
> The title of the United States to any abandoned shipwreck asserted under subsection (a) of this section is transferred to the State in or on whose submerged lands the shipwreck is located.

43 U.S.C. § 2105.

Fairport's action for lack of jurisdiction based on the Eleventh Amendment to the United States Constitution. The district court determined that jurisdiction depended on whether the ASA had transferred title to the *Captain Lawrence* to the State, a question that turned on whether the owner of the *Captain Lawrence*, Wilfred Behrens, had abandoned the vessel. The district court conducted an evidentiary hearing and later dismissed Fairport's action. *Fairport Int'l Exploration, Inc. v. The Captain Lawrence*, 913 F. Supp. 552 (W.D. Mich. 1995) ("*Fairport I*"). The court found that the State did not need to establish definitively that the vessel was abandoned. According to the court, the Eleventh Amendment would bar the suit if the State showed by a preponderance of the evidence that Behrens abandoned the *Captain Lawrence* and that, therefore, the State had a colorable claim to it. The district court concluded that the State met this standard and found that the State had a colorable claim of ownership of the *Captain Lawrence* under the ASA. As a result, the district court held that the Eleventh Amendment prohibited Fairport's action against the State.

Fairport appealed the district court's decision in *Fairport I*. This court affirmed the district court's ruling. *Fairport Int'l Exploration, Inc. v. The Captain Lawrence*, 105 F.3d 1078 (6th Cir. 1997) ("*Fairport II*"). On April 27, 1998, the United States Supreme Court vacated *Fairport II* and remanded the case to this court for proceedings consistent with the Supreme Court's holding in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998).

In *Fairport Int'l Exploration, Inc. v. The Captain Lawrence*, 177 F.3d 491 (6th Cir. 1999) ("*Fairport III*"), this court applied *Deep Sea Research* and remanded the case to the district court with instructions to apply the "clear and

convincing evidence" standard in order to determine whether the State proved that Behrens abandoned the *Captain Lawrence* under the ASA. According to *Deep Sea Research*, it was improper for the district court to conclude that the Eleventh Amendment barred suit against the State once the State established that it had a colorable claim to the vessel. This court noted that *Deep Sea Research* "definitively instructs us that, if a State does not possess a shipwreck, the Eleventh Amendment does not prevent a federal court from entertaining claims under the ASA to the shipwreck." *Fairport III*, 177 F.3d at 497. This court ordered the district court to "conduct only one 'abandonment' inquiry, [which] does not ask a preliminary jurisdictional question, but rather resolves whether Behrens abandoned the ship, and thus whether the ASA transfers title to Michigan." *Ibid.* The district court was instructed to "consider whether Michigan can prove that it owns the shipwreck--that is, whether clear and convincing evidence shows that Behrens abandoned the *Captain Lawrence*." *Id.* at 501.[2]

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[2] The district court was instructed that the State "may prove abandonment by circumstantial evidence," but that the circumstantial evidence presented should be analyzed under the clear and convincing standard. *Fairport III*, 177 F.3d at 500.

This court elaborated on the evidence that the district court was to consider when applying the clear and convincing evidence standard:

> [T]he district court must reexamine, and supplement if necessary, the evidence adduced in the earlier proceedings . . . . In light of the conflicting evidence regarding whether Behrens had access to the technology necessary to salvage the ship, the lack of evidence concerning whether Behrens ever returned to Poverty Island, and the testimony regarding Behrens's intention to return, the district court must determine 'whether the evidence is fit to induce conviction in the minds of reasonable persons under this elevated, relatively stringent evidentiary standard.' *Miller's Bottled Gas, Inc. v. Borg-Warner Corp.*, 955 F.2d 1043, 1050 (6th Cir. 1992).

*Id.* at 501. In a footnote at the end of this passage, this court stated:

> While the record might support a logical inference that Behrens did not intend to reclaim his ship, it also appears to support a finding that Behrens passed away before he raised the funds to effect a salvage operation; his lack of overt efforts to claim the ship may comport as much with a concern for secreting the putative gold as with an intent to abandon the ship.

*Id.* at 501 n.4.

Following remand, on November 2, 1999, the district court again dismissed Fairport's claim. *Fairport Int'l Exploration, Inc. v. The Captain Lawrence*, 72 F. Supp. 2d 795 (W.D. Mich. 1999) ("*Fairport IV*"). The district court did not

conduct an evidentiary hearing on remand. The court reviewed the existing record in the case, including the conflicting evidence noted by this court in *Fairport III*, and concluded that the evidence clearly and convincingly supported the conclusion that Behrens abandoned his vessel. Fairport timely filed a notice of appeal.

III

Fairport argues that the district court should have conducted an evidentiary hearing before determining if the State could prove by clear and convincing evidence that the *Captain Lawrence* was abandoned. Fairport requests that we remand this case to the district court with instructions to conduct an evidentiary hearing. In the alternative, Fairport argues that the district court erred in concluding that the State proved by clear and convincing evidence that the *Captain Lawrence* was abandoned. We will address each of Fairport's arguments in turn.

A

This court reviews a district court's decision not to conduct an evidentiary hearing for abuse of discretion. *See Cook v. American Steamship Co.*, 134 F.3d 771, 775 (6th Cir. 1998). Under this standard, this court will affirm the district court unless this court is left with "a definite and firm conviction that the trial court committed a clear error of judgment." *Monette v. AM-7-7 Baking Co.*, 929 F.2d 276, 280 (6th Cir. 1991); *Davis v. Jellico Community Hosp., Inc.*, 912 F.2d 129, 133 (6th Cir. 1990).

Fairport argues that the district court erred in not conducting an evidentiary hearing when this case was remanded to the district court pursuant to *Fairport III*. Fairport contends that

the original evidentiary hearing conducted on April 12-13, 1995 was insufficient in light of the subsequent legal developments that occurred in the case. In addition, Fairport claims that this court "strongly hinted" that another evidentiary hearing may be helpful, when stating in *Fairport III*, "[W]e observe that the district court must reexamine, and supplement if necessary, the evidence adduced in the earlier proceedings." 177 F.3d at 501. In *Fairport III*, this court specifically mentioned that conflicting evidence existed as to whether Behrens: (1) possessed the technology to salvage the *Captain Lawrence*, (2) returned to Poverty Island, and (3) intended to return to salvage his ship. *Ibid.* Fairport claims that the fact that this court mentioned the existence of this conflicting evidence supports the need for another evidentiary hearing.

This court did not mandate that the district court conduct an evidentiary hearing on remand, however. That decision rested solely in the discretion of the district court. This court ordered the district court to reexamine the evidence presented in the earlier proceedings. The district court did indeed do so, including discussing the areas of conflicting evidence that this court described in *Fairport III*. This court also instructed the district court to supplement the evidence *if necessary*, leaving the final decision on conducting an evidentiary hearing in the hands of the district court.

In deciding not to conduct a second evidentiary hearing, the district court noted that given the increased burden placed on the State on remand, Fairport had no greater incentive to bring evidence of non-abandonment than it had at the original evidentiary hearing:

> Because the State was held to a lower standard of

> proof at the [original] evidentiary hearing, Plaintiff had a strong incentive to make its best case on the issue of abandonment at the time of the original hearing. Because the State is now being held to a higher burden of proof, Plaintiff has no greater incentive on review than it had at the initial evidentiary hearing to bring forward evidence in support of its position of non-abandonment. The Court does not believe a second evidentiary hearing is necessary to protect Plaintiff's interests.

*Fairport IV*, 72 F. Supp. 2d at 797-98. The district court offered a rational explanation for its decision not to conduct a second evidentiary hearing in light of the higher burden of proof being applied to the State on remand.

The only case Fairport relies upon to support its position is *Employers Ins. of Wausau v. Petroleum Specialties, Inc.*, 69 F.3d 98 (6th Cir. 1995). In that case, however, the district court granted summary judgment *sua sponte* without the non-moving party having had the opportunity to develop a record. *Id.* at 105. That, of course, is a much different situation than here, in which a record had been developed, new evidence had not come to light after the initial evidentiary hearing, and the case was returned to the district court to re-analyze the evidence under a different legal standard.

In *Fairport III*, this court did not mandate a second evidentiary hearing. In *Fairport IV*, the district court offered a rational explanation for why it believed a second evidentiary hearing was not necessary. In this appeal, Fairport has not presented a convincing legal argument that the district court abused its discretion in not conducting a second evidentiary

hearing. Therefore, we conclude that the district court did not abuse its discretion in not conducting a second evidentiary hearing.

B

In reviewing the district court's determination that the State proved by clear and convincing evidence that the *Captain Lawrence* was abandoned, we note that a factual determination of the district court will not be overturned by this court unless it is clearly erroneous. A factual determination is clearly erroneous if, upon review of the entire evidence, this court is level with the definite and firm conviction that a mistake was committed. *See Bldg. Serv. Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway*, 46 F.3d 1392, 1399 (6th Cir. 1995). This court normally gives great deference to the district court's factual determinations since the district court is in a superior position to appraise the evidence and to judge the credibility of witnesses. *See ibid.*

When this court remanded this case to the district court to determine if the State had proven by clear and convincing evidence that the *Captain Lawrence* was abandoned, the district court was instructed that the State may prove by inference that a shipwreck last owned by a private party was "abandoned." *Fairport IV*, 72 F. Supp. 2d 795, 797 (citing *Fairport III*, 177 F.3d at 500). This court noted that neither lapse of time nor an owner's failure to return, standing by themselves, will necessarily establish abandonment. *Ibid.* Instead, these may be part of a combination of facts that may support a finding of abandonment if, taken together, they clearly and convincingly show that abandonment occurred. *Fairport III*, 177 F.3d at 500.

In remanding the case to the district court, this court noted several facts about which there existed conflicting evidence, namely: (1) whether Behrens had access to the technology necessary to salvage the ship, (2) whether Behrens ever returned to Poverty Island, (3) whether Behrens intended to return, and (4) whether a lack of funds or "a concern for secreting the putative gold" explained why Behrens did not attempt to salvage the ship. *Id.* at 501 & n.4. Fairport challenges the district court's findings as to each of these facts. First, Fairport claims that the district court did not "clearly and convincingly exclude the hypothesis that it was poverty, not an intent to abandon, that kept Behrens from returning to salvage the *Captain Lawrence*." Plaintiff-Appellant's Brief at 12. Second, Fairport claims that the district court erred in its factual findings that Behrens had access to the technology necessary to recover the *Captain Lawrence* and that Behrens did not attempt or intend to attempt to salvage the *Captain Lawrence*. As a result of these errors, Fairport claims that the district court erred in its ultimate finding that the State clearly and convincingly proved that the *Captain Lawrence* was abandoned. We will first address Fairport's arguments regarding the poverty hypothesis and then address Fairport's arguments regarding the district court's finding of abandonment.

1

Fairport argues that this court's language in footnote four of *Fairport III* indicates that this court intended that the district court weigh the hypothesis that it was poverty that caused Behrens not to attempt to recover the *Captain Lawrence* with the hypothesis that Behrens abandoned the ship. Fairport contends that the district court erred by not weighing these hypotheses.

Before considering Fairport's argument that the district court did not adequately weigh the competing hypotheses, we must address Fairport's initial assertion that this court directed a weighing of hypotheses. Nowhere in *Fairport III* did this court state that the district court was required to weigh the poverty hypothesis against the abandonment hypothesis. Nor did this court direct the State to disprove the poverty hypothesis by clear and convincing evidence. The test was clearly stated: The State had to prove clearly and convincingly that Behrens abandoned his ship. This court noted that evidence in the record might support a finding that Behrens was unable to raise the funds necessary to attempt to recover the ship, but this brief mention in a footnote cannot be interpreted as Fairport would have it. *Fairport III*, 177 F.3d at 501 n.4. It was not necessary for the district court, nor is it necessary for this court, to engage in a weighing of hypotheses. It also was not necessary for the district court, nor is it necessary for this court, to force the State to disprove the poverty hypothesis by clear and convincing evidence. Such a standard has no support in the ASA or in case law.

While it was not necessary for the district court to engage in a weighing of hypotheses, it was appropriate for the district court to consider evidence that poverty or a motivation to conceal the putative gold explains why Behrens did not return to the ship. The district court did consider this evidence and concluded that it was not sufficient to prevent the court from finding that Behrens abandoned the *Captain Lawrence*. On appeal, we review the evidence Fairport presents regarding Behrens's alleged poverty not to weigh the evidence against that of abandonment, but to consider whether the evidence is so strong as to undermine the district court's ultimate finding of abandonment.

Fairport relies on the following evidence to support its theory that it was poverty, not an intent to abandon, that prevented Behrens from salvaging the *Captain Lawrence*:

(1)The district court found in *Fairport I* that Behrens, after 1933, never owned "another boat worthy of the lake waters around Poverty Island." 913 F. Supp. at 555.

(2)Before Behrens set out on his fateful voyage, he did not purchase a new boat, but instead he purchased the *Captain Lawrence*, a boat built in 1898 that had been raised from the bottom of the Menominee River in 1931. At the time he purchased it, the *Captain Lawrence* had depreciated to a fraction of what Behrens would have had to spend on a comparable new boat. Behrens paid $150 for the *Captain Lawrence* and recorded his loss in the Record of Casualty at $200. New boats ranged in value from $165 for an 8-foot dinghy, $1200 for a 22-foot outboard motor launch, $2500 for a 40-foot schooner, and $14,500 for a 60-foot schooner similar to the *Captain Lawrence*. In addition, Behrens was unable to afford insurance on the *Captain Lawrence*.

(3)In *Fairport I*, the district court found that "[Behrens's daughters] recalled that he would go up north on diving expeditions . . . and that he was concerned about getting funds to finance an expedition." 913 F. Supp. at 555.

(4)Alice Bergmans, Behrens's daughter, testified that: (1) when Behrens died he was so poor that other

> family members had to pay to bury him; (2) Behrens "mentioned his boat, the *Captain Lawrence*, and he was trying to finance it so that he could go back and repair it or do something to it;" (3) "I don't think he ever gave up the thought of it because he was trying to get money to do it, and I don't think he ever gave it up because he always talked about his boat . . . . ;" (4) "I think that's where he did go [the *Captain Lawrence* wreck site] to try to make arrangements and everything, but it was the money that he had to get his crew together and everything."

The district court was not required to consider this evidence as a hypothesis to be weighed against a separate hypothesis that Behrens abandoned the *Captain Lawrence*. Rather, the district court was to consider this evidence in light of the remaining evidence presented by the State in order to prove that Behrens abandoned the *Captain Lawrence*. This is precisely what the district court did in concluding that, even in light of this evidence of Behrens's alleged poverty, the State proved by clear and convincing evidence that Behrens intended to abandon the *Captain Lawrence*.

We agree with the district court's finding. The evidence Fairport relies upon to demonstrate that poverty prevented Behrens from recovering the *Captain Lawrence* is meager. Most of the evidence does not even address Behrens's financial status after the wreck of the *Captain Lawrence*. The most substantial portion of the evidence as to this point was the testimony of Bergmans. However, the district court determined that it would not give the testimony much weight, stating that it was "based on very old and incomplete memories" and was of a "self-serving nature." 72 F. Supp. 2d at 800. Upon review of Bergmans's testimony and the district

court's explanation for why it did not believe the testimony was credible, we conclude that the district court acted properly in not according it significant weight.

Fairport claims that the district court's only[3] other attempt to address the poverty hypothesis was noting that in 1936 a salvage diver charged approximately $100 per day for Lake Michigan salvage from a rental boat. *Id.* at 799. This evidence was placed into the record by Kenneth R. Pott, a witness for the State. Fairport contends that Pott's testimony was hearsay-within-hearsay, because his testimony was based on information in a newsletter published by the Wisconsin Marine Historical Society containing an historical account of the cost of salvage divers in 1936. Fairport's contention that this evidence is hearsay is without merit. Pott, a maritime archaeologist and curator of the Michigan Maritime Museum, testified as an expert witness. The basis for his opinion on salvage costs in the 1930s was of a type reasonably relied upon by experts in the field. Furthermore, Fairport did not object to Pott's testimony when it was given.

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[3] The district court also noted that "Poverty Island is not located out in the middle of Lake Michigan. It is in a chain of islands, stretching south from the Garden Peninsula of Michigan to the Door Peninsula of Wisconsin and could be easily accessed from Michigan or Wisconsin." 72 F. Supp. at 799. The district court appeared to be indicating that the proximity of the island to the shorelines of Michigan and Wisconsin would have enabled Behrens to purchase a cheaper craft to salvage the ship. Fairport claims that "[t]his contention is belied by the record, which shows that the *Captain Lawrence* itself sank close to shore." Plaintiff-Appellant's Brief at 17. It appears that Fairport is arguing that since the *Captain Lawrence*, a more substantial craft, sank near Poverty Island in poor conditions, a cheaper craft could not have been used to salvage the ship in normal conditions. This argument is specious. Although the Titanic was sunk by an iceberg, lifeboats were still able to navigate the icy waters of the North Atlantic to save its passengers.

In light of the meager evidence presented by Fairport, the district court's proper determination not to give great weight to Bergmans's testimony, and the additional evidence relied upon by the district court in finding that Behrens could afford to salvage the *Captain Lawrence*, we conclude that the district court's finding that poverty did not prevent Behrens from attempting to salvage the *Captain Lawrence* was not clearly erroneous.

2

Fairport also claims that, regardless of the poverty hypothesis, the district court's finding that Behrens abandoned the *Captain Lawrence* was clearly erroneous. Fairport notes that in *Fairport IV*, the district court incorporated its findings of fact from *Fairport I*. The findings included the following: (1) the *Captain Lawrence* was a relatively recent wreck; (2) the *Captain Lawrence* sank in 40-60 feet of water; (3) it was technologically feasible to recover the *Captain Lawrence* in 1933; (4) Behrens valued the *Captain Lawrence* at $200 and wrote it off as a "total loss" on the casualty report he filed; (5) Behrens had no insurance on the *Captain Lawrence* when it sank; (6) Behrens declined lifesaving assistance from the Coast Guard; (7) Behrens never attempted to salvage the wreck; and (8) Behrens died intestate. *Fairport IV*, 72 F. Supp. 2d at 798. Fairport concedes all of these findings of fact except (3) and (7). Fairport claims that these two findings of fact,[4] however,

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[4] These two findings of fact correspond with the three issues on which this court noted the existence of conflicting evidence in *Fairport III*, namely (1) whether Behrens had access to the technology necessary to salvage the *Captain Lawrence*, (2) whether Behrens ever returned to Poverty Island, and (3) whether Behrens intended to return to Poverty

were clearly erroneous and that, as a result, the district court's ultimate finding that Behrens abandoned the *Captain Lawrence* was clearly erroneous.

In concluding that it was technologically feasible for Behrens to recover the *Captain Lawrence* in 1933, the district court relied on a number of facts. The district court noted evidence indicating that the remains of the *Captain Lawrence* were accessible to Behrens. In the Report of Casualty, Behrens stated that a wind came up and threw the *Captain Lawrence* onto the beach. Fairport's president, Steven Libert, testified that portions of the wreckage, including a door, were found on Poverty Island. In addition, there was evidence that the vessel was pounded to pieces. Finally, to the extent that portions of the *Captain Lawrence* sank in the water, testimony revealed that the wreckage allegedly associated with the *Captain Lawrence* is in 40 to 60 feet of water along the north coast of Poverty Island. *Ibid.*

The district court also noted that Behrens had the capability of recovering portions of the wreckage of the *Captain Lawrence*. The district court stated that SCUBA, which was not invented until World War II and was not commonly used in the United States until the 1950s, would not have been

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Island. 177 F.3d at 501. The district court's finding that Behrens never attempted to salvage the *Captain Lawrence* subsumes both the issues of whether he ever returned, or intended to return, to Poverty Island.

necessary for Behrens to have used to recover the remains of the *Captain Lawrence*. *Id.* at 798-99. Evidence indicated that Behrens continued to engage in salvaging operations after the destruction of the *Captain Lawrence* and that he dove with a hard hat, a heavy suit, and lead boots, and breathed through a hose that supplied air from the surface. *Id.* at 799. The district court stated that "[t]here appears to be no dispute that a hard hat diver could have engaged in salvaging operations at depths of 40-60 feet. Moreover, the wreckage would not have been so widely scattered before the winter storms and the lapse of some 60 years." *Ibid.*

According to the district court, only evidence relating to visibility supported the possibility that it was not feasible to recover the *Captain Lawrence*. There was evidence in the record that walking of the lake bottom in lead boots would have stirred up silt on the lake bottom and reduced visibility to close to zero. However, the district court concluded that, "Although salvaging might have been more difficult in the days before SCUBA, the Court does not find that Behrens lacked access to the technology necessary to salvage the vessel." *Ibid.*

Fairport challenges these factual findings. Fairport states that the district court found in *Fairport I* that the *Captain Lawrence* was embedded in the bottom of Lake Michigan. 913 F. Supp. at 557. As a result, Fairport asserts that it would be impossible for hard hat divers of the 1930s, or for SCUBA divers, to locate the wreck. According to Fairport, the technology necessary to locate an embedded wreck is remote sensing technology, which allows salvagers to find wrecks embedded in the bottomland, but which was not available until the 1980s. Fairport also disputes the district court's statement regarding visibility. Fairport relies on the

testimony of one of the State's witnesses, John Halsey, who stated that salvage under these conditions would be not just more difficult, but "almost impossible." Fairport asserts that since the remains of the *Captain Lawrence* were embedded and visibility for a hard hat diver on the lake bottom would be "almost impossible," the district court erred in concluding that it was technologically feasible for Behrens to recover the *Captain Lawrence* in 1933.

The evidence relied upon by Fairport simply is not enough to demonstrate that the district court clearly erred in its finding that it was technologically feasible for Behrens to recover the *Captain Lawrence* in 1933. It is true that in *Fairport I*, the district court stated that the *Captain Lawrence* was embedded, but the district court was referring to the present state of remains of the vessel. 913 F. Supp. at 556. At no time has the district court stated that the remains of the *Captain Lawrence* were embedded in bottomland immediately after the shipwreck or soon thereafter. Moreover, the district court noted in *Fairport IV* that, "portions of the wreckage, including a door, were found on Poverty Island. There is also evidence that the vessel was pounded to pieces. To the extent that portions of the vessel sank in the water, the testimony revealed that the wreckage allegedly associated with the *Captain Lawrence* is in 40 to 60 feet of water along the north coast of Poverty Island." 72 F. Supp. 2d at 798. In addition, the district court noted evidence in the record that, "the wreckage would not have been so widely scattered before the winter storms and the lapse of some 60 years." *Id.* at 799.

Fairport cannot rely on the district court's finding that the *Captain Lawrence* is presently embedded to support its argument that it was not technologically feasible for Behrens to recover the vessel. Evidence in the record supports the

district court's finding that during Behrens's lifetime, portions of the ship were not embedded and could have been salvaged with the technology available to him. Fairport is left to rely solely on evidence relating to visibility on the lake bottom. That evidence was based on a dive made in 1994, over sixty years after the wreck of the *Captain Lawrence*. *Fairport I*, 913 F. Supp. at 555. The district court properly considered and discounted this evidence. The district court did not clearly err in concluding that, although it may have been difficult, it was technologically feasible for Behrens to recover the *Captain Lawrence* [5]

The other finding of the district court challenged by Fairport is whether Behrens attempted or intended to attempt to salvage the remains of the *Captain Lawrence*. The district court concluded that "There was no evidence that Behrens ever returned to Poverty Island to attempt to salvage the *Captain Lawrence*, or even evaluate the feasibility of salvaging the vessel." *Fairport IV*, 72 F. Supp. 2d at 799. Fairport argues that the district court improperly excluded evidence of Behrens's subsequent trips to Poverty Island and of his intent to salvage the *Captain Lawrence* presented in

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[5] In addition, as the State rightly points out, even if it was *not* technologically feasible for Behrens to recover the *Captain Lawrence*, such a finding of fact could still be used to support the conclusion that Behrens abandoned the ship. Once Behrens would have realized that it was not technologically feasible to recover the *Captain Lawrence*, he may very well have lost hope of salvaging the vessel and have decided to abandon it. Therefore, even if Fairport could demonstrate that it was clearly erroneous for the district court to find that it was technologically feasible for Behrens to recover the *Captain Lawrence*, this error would not add much support to Fairport's argument that the district court's ultimate finding of abandonment was clearly erroneous.

the testimony of his daughters, Alice Bergmans and Gladys Nally.

The district court explained at length its decision to discount this testimony, concluded that the evidence was vague, ambiguous, and self-serving. The district court stated that the testimony was "based on very old and incomplete memories." *Id.* at 800. According to the court, it was "not clear from the testimony whether they are recalling their father's desire to engage in salvaging in upper Lake Michigan in general, or specifically to return to the *Captain Lawrence*." *Ibid.* Furthermore, the district court noted that pursuant to the Salvage Bill of Sale assigning the Behrens family's remaining rights to the *Captain Lawrence* to Fairport, "the family was to receive 20% in kind distribution of the property salvaged from the shipwreck and two percent in kind distribution of any artifacts recovered from within an injuncted area in the vicinity of the *Captain Lawrence*." *Ibid.* In light of this fact, the district court made a credibility judgment that, "[a]fter years of disinterest and silence, the daughters' current recollections are undoubtedly colored by the potential of receiving some memento from their father." *Ibid.* The district court did not summarily exclude the testimony of Behrens's daughters. Rather, the court provided a detailed explanation for why the testimony was not reliable and lacked credibility. After reviewing the testimony presented and the district court's reasons for not relying upon it, we conclude that the district court acted properly in finding that Behrens did not return or intend to return to salvage the *Captain Lawrence*.

Fairport's remaining argument as to this issue is that the district court incorrectly shifted the burden of proof from the State to Fairport as to whether Behrens returned or intended to return to salvage the *Captain Lawrence*. Fairport claims

that the State had the burden of proving this issue and that since the State did not present evidence as to this issue, the district court should have drawn an inference of non-abandonment in favor of Fairport. This argument is without merit. The State did not have the burden of proving that Behrens did not return or intend to return to salvage the *Captain Lawrence*; it had only the burden of proving by clear and convincing evidence that Behrens abandoned the *Captain Lawrence*. In order to meet the burden of proving that Behrens did not return or intend to return to salvage the *Captain Lawrence*, the State would have to demonstrate an affirmative statement or action on Behrens's part indicating his intent not to return to Poverty Island to salvage his ship. This would mean that the State would have had the burden of proving express abandonment, a test that this court specifically refused to impose in this case. *Fairport III*, 177 F.3d at 499-500.

The remainder of Fairport's argument is based on the assertion that if the district court's findings of fact as to feasibility and lack of intention to return are in error, then the remaining facts[6] relied upon by the district court are not sufficient to support the district court's ultimate finding of abandonment. Fairport concedes that the remaining findings of fact are supported by the record. Fairport only asserts

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[6] The remaining facts relied upon by the district court were: (1) the *Captain Lawrence* was a relatively recent wreck; (2) the *Captain Lawrence* sank in 40-60 feet of water; (3) Behrens valued the *Captain Lawrence* at $200; (4) Behrens had no insurance on the *Captain Lawrence* when it sank; (5) Behrens declined lifesaving assistance from the Coast Guard; and (6) Behrens died intestate. *Fairport IV*, 72 F. Supp. 2d at 798.

that these findings of fact cannot support a finding of abandonment. The district court properly found that it was technologically feasible for Behrens to recover *Captain Lawrence*, but that he did not attempt or intend to attempt to do so. In addition, we note that Behrens described his vessel as a "total loss" on the Record of Casualty. These facts go far in supporting the district court's finding that the State clearly and convincingly proved that Behrens abandoned the *Captain Lawrence*. To the extent that Fairport casts doubt on the weight of the remaining findings of fact relied upon by the district court, we conclude that it is insufficient to render the district court's ultimate finding of abandonment clearly erroneous.

IV

For the foregoing reasons, the judgment of the district court is AFFIRMED.

# UNITED STATES COURT OF APPEALS
# FOR THE SIXTH CIRCUIT

## No. 99-2415

FAIRPORT INTERNATIONAL EXPLORATION, INC.,
Plaintiff-Appellant,

v.

THE SHIPWRECKED VESSEL, known as the CAPTAIN LAWRENCE, in rem,
Defendant,

STATE OF MICHIGAN,
Intervenor-Appellee.

Before: BOGGS and MOORE, Circuit Judges; COHN, District Judge.

## JUDGMENT

On Appeal from the United States District Court for the Western District of Michigan at Marquette.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

**ENTERED BY ORDER OF THE COURT**

/s/ Leonard Green
Leonard Green, Clerk

# APPENDIX B

## UNITED STATES DISTRICT COURT
## WESTERN DISTRICT OF MICHIGAN
## NORTHERN DIVISION

**Fairport International Exploration, Inc.,**

**Plaintiff,**

**File No. 2:94-CV-164**

**v.**

**HON. ROBERT HOLMES BELL**

THE SHIPWRECKED VESSEL, known as The Captain Lawrence, which sank in 1933, her engines, tackle, appurtenances and cargo located within two nautical miles of a point at coordinates 45 degrees 32 minutes North Latitude and 86 degrees 40 minutes West Longitude,

Defendant.

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## OPINION

This action was remanded by the Sixth Circuit Court of Appeals for a determination as to whether clear and convincing evidence shows abandonment of the Captain Lawrence. Fairport Int'l Exploration, Inc. v. The Shipwrecked vessel, known as The Captain Lawrence, 177 F.3d 491, 501 (6th Cir. 1999) ("Fairport III").

I.

Plaintiff Fairport International Exploration, Inc. initiated this admiralty in rem action in 1994 to establish its right to salvage The Captain Lawrence, a shipwrecked vessel, which sank in Lake Michigan in 1933. The State of Michigan intervened in the action under the Abandoned Shipwreck Act of 1987 ("ASA"), 43 U.S.C. § 2101-2106, claiming that the vessel was an abandoned shipwreck embedded in State lands and accordingly belonged to the State. The State moved to dismiss for lack of jurisdiction.

This Court, following the rule applied in Deep Sea Research, Inc. v. The Brother Jonathan, 883 F. Supp. 1343 (N.D. Cal. 1995), aff'd, 102 F.3d 379, aff'd in part, vac. In part, 523 U.S. 491 (1998), required the State to prove abandonment by a preponderance of the evidence in order to show that it had a colorable claim to the vessel. Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel known as The Captain Lawrence, 913 F.Supp. 552, 555 (W.D. Mich. 1995) ("Fairport I"). Following an evidentiary hearing, this Court determined that the State of Michigan had shown abandonment by a preponderance of the evidence, and that the Court was accordingly prevented under the Eleventh Amendment from exercising jurisdiction over the dispute. Id. at 559.

The United States Court of Appeals for the Sixth Circuit affirmed, see. Fairport Int'l Exploration, Inc. v. Shipwrecked Vessel, 105 F.3d 1078 (6th Cir. 1997) ("Fairport III"), vacated, _ U. S. _, 118 S. Ct 1558 (1998), but the Supreme Court vacated that decision and remanded the case to the Sixth Circuit for further consideration in light of the Supreme Court's ruling in California v. Deep Sea Research, Inc., 523 U.S. 491 (1998).

On remand, the Sixth Circuit noted that the Supreme Court's opinion in Deep Sea Research definitively instructs that if a State does not possess a shipwreck, the Eleventh Amendment does not prevent a federal court from entertaining a claim under the ASA to the shipwreck. Fairport III, 177 F.3d at 497. Thus, this Court does have jurisdiction to entertain the competing claims of Fairport and the State to the shipwreck. The Sixth Circuit remanded the case to this Court for complete adjudication of the competing claims to the Captain Lawrence. Id. at 498.[1]

The Sixth Circuit provided guidance to this Court in its consideration of two issues: the means of proving abandonment, and the burden of proof placed upon Michigan. First, the Sixth Circuit held that a State may prove by inference that a shipwreck last owned by a private party is "abandoned," for the purposes of admiralty law and the ASA. 177 F.3d at 500. The Sixth Circuit clarified that neither lapse of time nor an owner's failure to return to a shipwreck site, standing alone, will necessarily establish abandonment.

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[1] The Sixth Circuit directed as follows:

When the district court revisits this case on remand, it will not conduct a threshold inquiry to determine whether Michigan has a colorable claim under the ASA. Instead, it will decide whether Behrens abandoned the shipwreck; if he did, the ASA vests title in Michigan. If he did not, the ASA does not apply. Michigan may prove abandonment by circumstantial evidence, see supra, but Michigan must prove with clear and convincing evidence that Behrens abandoned the ship. 177 F.3d at 500.

Nevertheless, these are factors to be considered, along with the place of the shipwreck and the actions and conduct of the parties having ownership rights in the vessel. Id. at 7-00 (quoting Mover v. Wrecked and Abandoned Vessel, known as Andrea Dorea, 836 F. Supp. 1099, 1105 (D. N.J. 1993)).

Second, the Sixth Circuit held that when the state seeks to establish title under the ASA it must prove abandonment with clear and convincing evidence. 177 F.3d at 501. The Sixth Circuit directed this Court to "reexamine, and supplement if necessary, the evidence adduced in earlier proceedings" on the issue of abandonment under the exacting standard of clear and convincing evidence. Id. The Sixth Circuit also instructed that the Court should conduct its abandonment inquiry in light of the "conflicting evidence regarding whether Behrens had access to the technology necessary to salvage the ship, the lack of evidence concerning whether Behrens ever returned to Poverty Island, and the testimony regarding Behrens's intention to return "Id.

II.

This Court has now had an opportunity to review the record of the evidentiary hearing.[2] The Court does not require supplementation of the record. In the order scheduling the original evidentiary hearing, this Court required the State to carry the burden of proof on the issue of abandonment by a preponderance of evidence. Because the State was held to a

[2] After entry of the Sixth Circuit's May 13, 1999, opinion in Fairport III, Intervenor-Appellee State of Michigan filed a motion for rehearing. The motion was denied on June 23, 1999, and the mandate was issued on July 6, 1999. The record was not returned to this Court, however, until October 19, 1999.

lower standard of proof at the evidentiary hearing, Plaintiff had a strong incentive to make its best case on the issue of abandonment at the time of the original hearing. Because the State is now being held to a higher burden of proof, Plaintiff has no greater incentive on review than it had at the initial evidentiary hearing to bring forward evidence in support of its position of non-abandonment. The Court does not believe a second evidentiary hearing is necessary to protect Plaintiff's interests.[3] Plaintiff's motion to set hearing will accordingly be denied.

Upon review of the record under the clear and convincing evidentiary standard, this Court is satisfied that the evidence already produced on the issue of abandonment is more than sufficient to support a finding that Captain Behrens abandoned his interest in the Captain Lawrence, even under the elevated and relatively stringent clear and convincing evidentiary standard.

[3] Because the Court finds the evidence sufficient to enter a ruling in favor of the State, the State is not being injured by the lack of a new opportunity to present evidence.

In arriving at this determination this Court incorporates all of the findings contained in this Court's opinion in

Fairport I:

> The Captain Lawrence is a relatively recent wreck. It did not sink in deep water. It was stranded on Poverty Island. Assuming the evidence Plaintiff has found is from the Captain Lawrence, the vessel is in pieces close to shore in only 40-60 feet of water. It was not technologically unfeasible to locate or to salvage the Captain Lawrence in the 1930's. Modern technology was not essential to the recovery of the vessel.
>
> The evidence, although circumstantial, clearly demonstrates Wilfred Behrens, intent to abandon the vessel. He valued the vessel at only $200, had no insurance on it, and wrote it off as a "total loss." Had he wanted to salvage the vessel, the best time would have been immediately after it was stranded on the beach. Yet there is no evidence that he attempted any salvage operations immediately after the wreck. The evidence shows that Behrens was offered assistance from the Coast Guard immediately after the storm, but declined it. The evidence shows that Behrens was an experienced salvager, and continued his salvage diving for over ten years after the shipwreck. Yet there is no evidence that he ever attempted to salvage the Captain Lawrence in the years after the wreck.
>
> Behrens did not discuss the location of the Captain Lawrence with his family. He died intestate. He did not leave his interest in the vessel to his family or to anyone else. There is no evidence that his crew showed any

> interest in returning to the Captain Lawrence. Behrens' family did not seek out salvage divers to help locate the remains of the Captain Lawrence. They showed no interest in finding the Captain Lawrence until Libert told them of the possibility of a link between the Captain Lawrence and the legendary gold treasure.
>
> 913 F. Supp. at 558-59.

After reviewing the record, and in response to the issues raised by the Sixth Circuit, the Court makes the following additional findings.

In Fairport III the Sixth Circuit referenced conflicting evidence regarding whether Behrens had access to the technology necessary to salvage the vessel.

This Court is not persuaded that a lack of technology presented any barrier to Behrens' ability to salvage the *Captain Lawrence. Behrens reported in the Report* of Casualty that the Captain Lawrence was stranded when a wind came up and threw the vessel onto the beach. Steven Libert, president of Fairport, testified that portions of the wreckage, including a door, were found on Poverty Island. (T-221). There is also evidence that the vessel was pounded to pieces. To the extent that portions of the vessel sank in the water, the testimony revealed that the wreckage allegedly associated with the Captain Lawrence is in 40 to 60 feet of water along the north coast of Poverty island. (T-37-38, 208).

Although evidence was presented that SCUBA was not invented until World War II, that it did not become common or widespread in the US until the 1950s, (T-86) , and that

Behrens was not a SCUBA diver, SCUBA would not have been necessary to salvage the vessel. Behrens continued to engage in salvaging operations after the destruction of the Captain Lawrence, so there is no dispute that he had access to the marine salvaging technology that was available at that time. Behrens dove with a hard hat, a heavy suit, and lead boots, and breathed through a hose which supplied air from the surface. There appears to be no dispute that a hard hat diver could have engaged in salvaging operations at depths of 40-60 feet. Moreover, the wreckage would not have been so widely scattered before the winter storms and the lapse of some 60 years.

The only feasibility issue raised at the evidentiary hearing was one of visibility. There was evidence that walking on the bottom in lead boots would have stirred up the silty lake bottom and brought visibility close to zero. (T-172). Although salvaging might have been more difficult in the days before SCUBA, the Court does not find that Behrens lacked access to the technology necessary to salvage the vessel.

There was no evidence that Behrens ever returned to Poverty Island to attempt to salvage the Captain Lawrence, or to even evaluate the feasibility of salvaging the vessel. Behrens' daughter, Gladys Nally, testified that her father went up north a lot, and that he went up to northern Lake Michigan after 1933, but she did not know what he did up there. (T-158-59).

Gladys Nally testified that her father was never able to get enough money together to get a ship that was worthy of the waters up around Poverty Island. (T-169). In this regard, the Court notes that Poverty Island is not located out in the middle of Lake Michigan. It is in a chain of islands, stretching

south from the Garden Peninsula of Michigan to the Door Peninsula of Wisconsin, and could be easily accessed from Michigan or Wisconsin. Moreover, there was always the option of boat rental. Evidence was introduced that in 1936 a salvage diver who dove in the area of Poverty Island, was charging $60 per day for diving, $10 per day for days he could not dive, and $40 per day for rental of a commercial fishing boat, and a share in the find.

Finally, the Sixth Circuit requested this Court to consider the testimony regarding Behrens' intention to return to Poverty Island.

The only evidence that even hints of an intent to return to the Captain Lawrence is the testimony of Behrens' daughters, Alice Bergmans and Gladys Nally. Alice Bergmans testified that she recalled her father discussing the subject of sunken treasure or looking for salvage. "That's all he ever talked about." (T-47). " [H]e mentioned his boat, the Captain Lawrence, and he was trying to finance it so he could go back and perhaps repair it or do something to do it." (T-47). In response to the direct question of whether Behrens expressed an interest in returning or looking for the wreckage, Bergmans relied on her own imprecise speculations. "I don't think he ever gave up the thought of it because he was trying to get money to do it, and I don't think he ever gave it up because he always talked about his boat and stuff." (T-48). Bergmans testified that Behrens was trying to raise some money to go back to upper Michigan, but he did not ever specify where he was going. (T-49). She was asked whether he discussed returning to the site of the Captain Lawrence. "I think that's where he did go to try to make arrangements and everything, but it was the money that he had to get his crew together and everything." (T-49-50). Bergmans explained

that she was very young when he would talk about this. Moreover, at the time the Captain Lawrence was wrecked Behrens was divorce from Alice Bergman's mother. Alice Bergmans was no longer living with her father, and he was a father that was always gone. (T-50).

According to Gladys Nally, Behrens continued to be involved in salvage diving for at least 10-12 years after the Captain Lawrence was wrecked. He was only doing river salvaging because the boat he was salvage diving off of at the time could not be taken upon the lake. (T-169). After the mid-1940's she did not know whether he continued to dive because he and her mother, Elsie Behrens, were separated, and eventually divorced, and Gladys no longer knew exactly what he was doing. (T-168).

The testimony of Alice Bergmans and Gladys Nally on the issue of Behrens' intent to return to the Captain Lawrence is based on very old and incomplete memories. What the daughters do recall is, at best, vague and ambiguous. Their testimony weaves together their father's interest in salvage diving in upper Lake Michigan with his interest in the Captain Lawrence. It is not clear from the testimony whether they are recalling their father's desire to engage in salvaging in upper Lake Michigan in general, or specifically to return to the Captain Lawrence. Alice Bergmans' testimony that Behrens indicated an intent to repair the Captain Lawrence is based upon sheer speculation. It appears that Bergmans has jumped from recollections of her father's fond descriptions of the Captain Lawrence to a conclusion that he intended to repair it.

The Court also views the daughters' testimony with some skepticism in light of its self-serving nature. The family

members assigned whatever rights they may have had in the Captain Lawrence to Gladys Nally, who assigned her interests to Fairport in a Salvage Bill of Sale. Pursuant to the Salvage Bill of Sale, the family was to receive 20% in kind distribution of the property salvaged from the shipwreck and two percent in kind distribution of any artifacts recovered from within an injuncted area in the vicinity of the Captain Lawrence. (T-159). After years of disinterest and silence, the daughters' current recollections are undoubtedly colored by the potential of receiving some memento from their father.

All of the documentary evidence and Behrens' own actions are consistent and support only one inference, i.e., that he intended to abandon the vessel. Behrens described the vessel as a "total loss" on the Record of Casualty. The vessel was not insured. Behrens stated that there was no cargo, and he estimated the value of the vessel, without regard to what may be covered by insurance or expense incurred in floating the vessel, at $200. Behrens declined the assistance offered by the Coast Guard the day after the wreck. A newspaper photograph of the Captain Lawrence in Gladys Nally's mother's possession had the caption "Schooner Pounded to Pieces," and a notation in handwriting, "Bill's *boat before it was wrecked off Poverty island.*" *(T-161-62).* Based upon the credible evidence, the conclusion is unavoidable that Behrens abandoned the Captain Lawrence as a total loss.

A suggestion has been made that Behrens might have purposely understated the value of his vessel and its cargo in order to dissuade others from trying to salvage it. This is pure speculation, and it also conflicts with the evidence. Behrens purchased the vessel a year and a half previously for $150. A comparable-sized vessel was selling new at the

time for $14,500. (T-102). Valuing the vessel at $200 clearly suggests that the actual value of a boat in a state of disrepair and in rather poor condition. (T-103). There is no evidence that either Behrens or any of his crew members made any attempt to salvage the boat or its cargo.

As the Sixth Circuit established in Fairport *III*, a claimant may prove abandonment by inference as well as by express deed. 177 F.3d at 499. Indeed, abandonment will rarely be supported by express deed. As Chris Shafer, Chief of the Great Lakes Shoreline Section in the Lakes and Water Management Division of the Department of Natural Resources testified, it is fairly unusual to see an active disclaimer of abandonment. Active disclaimers are generally limited to those circumstances where the owner of the vessel seeks to avoid potential liability for a hazard to navigation. (T-145).

This Court has carefully analyzed the evidence, and concludes that the evidence of Behrens' intent to abandon the vessel is overwhelming and easily meets the clear and convincing evidentiary standard.

Because this Court has found abandonment by clear and convincing evidence, the ASA vests title of the Captain Lawrence in the State of Michigan. The State's motion to dismiss Plaintiff's admiralty in rem action will accordingly be granted, and this case will be dismissed in its entirety.

An order and judgment consistent with this opinion will be entered.

Date: November 2, 1999

/s/ ROBERT HOLMES BELL

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

FAIRPORT INTERNATIONAL
EXPLORATION, INC.,

Plaintiff,

File No. 2:94-CV-164

v.

HON. ROBERT HOLMES BELL

THE SHIPWRECKED VESSEL, known as
The Captain Lawrence, which sank
in 1933, her engines, tackle,
appurtenances and cargo located
within two nautical miles of a
point at coordinates 45 degrees
32 minutes North Latitude and 86
degrees 40 minutes West Longitude,

Defendant.

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# ORDER AND JUDGMENT

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Plaintiff Fairport International Exploration, Inc.'s motion to set hearing (Docket 455) is DENIED.

IT IS FURTHER ORDERED that the State of Michigan's motion to dismiss (Docket # 11) is GRANTED and this case is *DISMISSED* in its entirety.

Date: November 2, 1999

/s/ ROBERT HOLMES BELL

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE